UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Dawn Brenner and Kathleen Brenner, as co-trustees for the heirs and next of kin of Dylan Brenner,	)	File No. 18-cv-2383 (NEB/ECW)
Plaintiffs,	)	St. Paul, Minnesota February 4, 2019 9:58 a.m.
vs.	)	
Danielle Sue Asfeld, et al.,	)	
Defendants.	)	

BEFORE THE HONORABLE NANCY E. BRASEL
UNITED STATES DISTRICT COURT JUDGE
(MOTION HEARING)

Proceedings recorded by mechanical stenography; transcript produced by computer.

APPEARANCES

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: We are on the record. Madam Clerk, would you call this case for us, please.

THE COURTROOM DEPUTY: Dawn Brenner, et al., v. Danielle Sue Asfeld, et al., Civil Case No. 18-cv-2383.

Counsel, would you please state your appearances for the record.

MR. STORMS: Your Honor, Jeff Storms on behalf of the Plaintiff and Jeffrey Montpetit on behalf of the Plaintiff as well.

THE COURT: Good morning.

And for the Defendants from the Sherburne County? Sorry.

MS. ANGOLKAR: Good morning. Stephanie Angolkar and Francine Kuplic for Sherburne County Defendants.

THE COURT: Thank you.

And for the MEnD Defendants?

MR. NOVAK: Tony Novak and Bradley Prowant, Your Honor.

THE COURT: Good morning.

MR. PROWANT: Good morning.

THE COURT: We are here on both a motion to amend and a motion to dismiss. Have the parties discussed how you'd like to handle oral argument in light of the opposing

motions here?

MR. STORMS: We had not, Your Honor.

THE COURT: All right. Why don't we take the motion to amend first.

Mr. Storms, are you going to argue that motion?

MR. STORMS: I am, Your Honor.

THE COURT: All right. Thank you. You may proceed.

MR. STORM: Good morning, Your Honor. May it please the Court. In addressing the motion to amend the complaint, the standard review here is really the lowest possible standard in terms of a burden on the Plaintiffs to amend their complaint. No scheduling order has been issued in this matter. We are seeking leave, though, because we had used our automatic right to amend the complaint, and we set forth in detail why that was. And I believe that the procedural history shows there was a good reason; that this happened very naturally in terms of how we got to a second amended complaint.

The main thrust of the argument against our amending the complaint is futility, and it's really the sole argument from Sherburne County. There's no allegation of bad faith or prejudice by Sherburne. The MEnD Defendants primarily rest on arguments of futility, but they do make some allegations of prejudice and there are some general

complaints about the length of the proposed second amended complaint.

I'm going to just briefly start with the MEnD motion or opposition and the MEnD Defendants. So in the initial complaint, we had -- or the first amended complaint, we had named Danielle Sue Asfeld, Amanda Nowell and Christina Leonard. All three of them we alleged deliberate indifference in addition to supplemental state law medical malpractice claims. They did not move to dismiss those claims. They answered.

In the second amended complaint that we propose, we added claims against Dr. Todd Leonard, both for individual violations, so deliberate indifference, and also in his supervisory capacity also as an individual. As I read MEnD's paperwork, they did not lodge an objection to Count One as it relates to Dr. Leonard, and I don't know if that was inadvertence or they are conceding that we've stated a claim against Dr. Leonard pursuant to Count One.

They did allege that our claims of supervisory liability against Dr. Leonard are futile, and I'm going to come back and address that along with the *Monell*, the futility arguments. There's sort of a broader brush that I just wanted to touch upon. Much of the MEnD complaint talks about how long -- or the MEnD opposition talks about how long the second amended complaint has become, and they are

basically saying, Why are you picking on us? You know, it was Sherburne County that's opposed your -- that moved to dismiss your first amended complaint. And the argument that neither Defendant has really addressed, and they have almost acted as if it doesn't exist, is that we've alleged that Sherburne County is vicariously liable for all the acts of MEnD and its employees, and that's as a result of their nondelegable duty to provide healthcare at Sherburne County to the inmates, detainees. And Sherburne County has never addressed that in either of their motions, and MEnD didn't address it in its opposition either. I shouldn't say Sherburne County's motions, their motion and their opposition.

THE COURT: Uh-huh.

MR. STORMS: But they have never addressed that argument, and we have set forth case law that shows it is nondelegable duty, which means that there's vicarious liability. So we needed to, in light of Sherburne County's opposition, continue to set forward facts that showed that we had stated claims against Sherburne County and those include the claims against the individual MEnD Defendants. And so for that reason, it's appropriate, in light of Sherburne County moving to dismiss our complaint, to address allegations against Sherburne County.

MEnD also says much about Mr. Dylan Brenner's 2016

incarceration, that it's immaterial or irrelevant. I think that couldn't be further from the truth, Your Honor. We have a continuity of care issue like we have in every other -- with every other medical provider. And in this case, the core allegations are that -- or a key allegation is that Sherburne County and MEnD had all this information about how sick Mr. Brenner was back in 2016. And they had a score of medical records that showed he was sick and had things like TBI and bipolar and PTSD and was suicidal, and so for that reason, those allegations are material to this case. And, again, we stated them in detail because Sherburne County came forward in response to our first amended complaint and said, You didn't plead enough facts about foreseeability and we believe all those facts go towards foreseeability.

And with respect to the length of the complaint, I would also say that the length of our complaint is not outside the scope at all for these types of cases. You know, two of the cases that we've referenced within our -- our supporting memorandum, one is the *Baxter-Knutson* case, which was a prior suicide case where MEnD had provided the medical treatment or lack thereof, and also the *Lynas* case, which involves both Sherburne County and MEnD. The *Lynas* complaint is approximately 33 pages. The *Baxter-Knutson* complaint is 37 pages. These are -- and they've answered in

both of those cases, so it's well within the scope of the length that we see because they are complicated cases. You have to allege deliberate indifference to each individual. You have multiple entities. So I really think that there's little merit to the idea that the complaint is too long, especially since I have sort of been put in a Goldilocks conundrum. I have Sherburne County saying it's too short, and them saying it's too long. We think we've pleaded just the right amount of facts and the critical facts.

And I also just briefly wanted to touch upon MEnD's allegations of scandalous allegations. There's nothing scandalous about stating something that's in the public record. Here we have a doctor who was disciplined by the board and reprimanded by the board for his failure to provide appropriate medical care. And critical to this case, you know, we have this -- in our second amended complaint at paragraph 229, a review of Dr. Leonard's practice revealed that on multiple occasions, Dr. Leonard authorized narcotics but failed to document objective clinical findings to support the need for ongoing medications, failed to document an assessment for his patient's risk of chemical dependency, toxicity, diversion, or suicide, and his failure in the past has a direct link to issues related to suicidality.

And when you look at a medical malpractice case,

you know, in Minnesota and state court, we have the standard medical malpractice forms. Whether or not you have ever been disciplined by the board is one of the standard questions because it is relevant to issues of care, so there's really nothing scandalous about citing something that is in the public record, and I would also note that an allegation related to that discipline was in the *Baxter-Knutson* case and it was not stricken from the public record.

Just briefly to close out MEnD on this issue, so the futile -- the claims of futility relate to supervisory liability and *Monell* liability. On the supervisory liability and *Monell*, I think it's important that you take a step back and look at everything in the cumulative whole and ask yourself what's plausible. And the facts that we've pled here is we have a doctor who has a history of being disciplined who then has created this correctional medical providing facility or correctional medical care company where we've alleged he's one, if not the only, medical doctor overseeing over 30 different facilities in Minnesota.

In this particular case, we saw that all the records, as we've alleged, are not time stamped, which is baffling that you would not have that level of continuity of care about when people are actually seeing patients. Also in this case, two of the nurses, Nurse Asfeld and Nowell,

did not even document seeing Dylan Brenner on the day they saw Dylan Brenner and received notice about his medications. They created chart notes days after Mr. Brenner committed suicide.

When -- We've also alleged that there were other instances of suicide that were directly related to the lack of proper medical care provided by MEnD. Taking all of those pleadings as a whole, we think we've met both supervisory liability, we have pled facts that Dr. Leonard was on notice of this pattern and practice and he was deliberately indifferent to it, similar to how he was deliberately indifferent individually towards Mr. Brenner as we set forth in the complaint; but similarly with respect to the *Monell* case, it's not critical at this point that we say here is the exact precise custom. That's not what you look at at this stage. And Judge Tunheim addressed that in the *Sagehorn* case. And we're not saying that there's a specific policy that's unconstitutional. We're saying there's a custom. And for those same reasons when you look at Dr. Leonard's history, the history of multiple suicides, the widespread deliberate indifference that we believe we've set forth in great detail related to this case, we've stated a plausible claim for both *Monell* and supervisory liability.

With respect to the Sherburne County opposition, so in our first amended complaint, we had had simply a

negligence case against Wes Graves and a vicarious liability claim against Sherburne County, both under ordinary negligence and under professional negligence. We have added Rebecca Lucar for both deliberate indifference and negligence, Denny Russell for deliberate indifference and negligence. We added a deliberate indifference claim as to Wes Graves and we added a deliberate indifference and negligence claim with respect to James Rourke.

THE COURT: And I'm right that the John Does are now out of the complaint; correct?

MR. STORMS: Correct, Your Honor. We have removed them from the second amended complaint and named individuals.

With respect to James Rourke, there is no mention in the opposition by the Sherburne County Defendants of him, and so I'm not sure why they did not append -- oppose his addition to the complaint, but I did not see it in their memorandum. Rebecca Lucar, Denny Russell, Wes Graves, these are simple claims at the pleading stage. We've alleged facts that each of them knew about Mr. Brenner's serious medical needs. And it's not just suicidality, bipolar, PTSD, suicidality, traumatic brain injury. And each of them had some of their own unique information and we've addressed that in the facts. Mr. Brenner had an objectively serious medical need, and these individuals were deliberately

indifferent to that.

And when we look at the *Iqbal* and *Twombly* standard, we've set forth more than sufficient facts; and really if you look at what some of the Courts have said recently within our district about amending the complaint, the Courts don't even necessarily weigh it as heavily as you might a Rule 12(b)(6) motion. Really you are looking to see is this frivolous. And we cited some of the authority of that as well. And these are certainly not frivolous claims, but we believe certainly they reach a 12(b)(6) standard and we have stated plausible claims for each one of these individuals, Your Honor.

THE COURT: How do you address the *Williams* case that is the recent Eighth Circuit case affirming a motion to dismiss or the grant of a motion to dismiss on similar facts? I'm sorry. Not *Williams*. It's *Whitney*.

MR. STORMS: *Whitney* out of the Eastern District of Missouri, I believe, yeah.

THE COURT: Correct.

MR. STORMS: So I actually pulled a copy of the complaint in that case, and I know Your Honor would have access to it on PACER. You are certainly welcome to my copy. But it's a seven-page complaint, and they literally did not plead knowledge, the actual words. They never said you knew that this individual had a serious medical need.

It's -- Frankly, it's just not a very adequate complaint for a Section 1983 deliberate indifference case. And so here we have pled that there is knowledge and we've pled facts to support that, Your Honor, and so I think that that's merely -- that case is merely a byproduct of -- of a deficient complaint that didn't plead knowledge. But we did so here. We pled notice and knowledge.

THE COURT: Thank you.

MR. STORMS: Thank you, Your Honor.

THE COURT: For the Sherburne Defendants, Ms. Angolkar.

MS. ANGOLKAR: Thank you, Your Honor. First of all, James Rourke is not named in the proposed amended complaint, so that's why Sherburne County hasn't addressed him. The first time I have heard that name is this morning.

THE COURT: It's -- My understanding is or my reading is it's in Exhibit B, which is the markup complaint. It shows James Rourke in his individual capacity, at least in the caption.

MS. ANGOLKAR: I -- What I have in front of me here doesn't have that.

MR. STORMS: May I interject for a second?

THE COURT: Please.

MR. STORMS: I actually believe in looking at what your pleading says is that you -- as part of a meet and

confer process, I handed over a draft complaint. I was told that there would not be an agreement; and then we had probably another four or five days between the time we met and conferred and I filed the complaint, and so I have reason to believe that maybe the Sherburne County walked -- worked off of our meet and confer documents and not off of what was actually filed.

MS. ANGOLKAR: So I guess I would object that there's been no meet and confer on the addition of James Rourke because we should be able to work in good faith off of what was sent to us to evaluate for an amended complaint. If there's new allegations added to that proposed complaint that then is filed, there hasn't been a meet and confer on those allegations.

THE COURT: Do you have reason to believe that you would treat James Rourke any differently in terms of your opposition to the amendment?

MS. ANGOLKAR: It depends on what's his -- what's his role?

MR. STORMS: James Rourke did the mental health assessment. We wrote about this in the memorandum too.

THE COURT: It's in the memorandum and the -- it's in the memorandum.

MR. STORMS: And so he was the one that did the mental health assessment and we allege that he facilitated

the movement from BH-5 to the Gamma Unit.

THE COURT: All right. Thank you.

MS. ANGOLKAR: Okay. And I interpreted that for Russell, so, yes, I would still incorporate the arguments.

MR. STORMS: Sorry. You are correct.

THE COURT: All right. Go ahead.

MS. ANGOLKAR: That?

MR. STORMS: I'm sorry. You are correct. Mr. Rourke was the individual who observed Mr. Brenner being depressed once he was in the Gamma Unit, and we allege that he took no action.

MS. ANGOLKAR: All right. Well, I -- I still stand by the argument that there's been no meet and confer with James Rourke, but I would still incorporate the same arguments in our memo to oppose the addition of James Rourke as a defendant based on the deliberate indifference and negligence arguments that we've made.

THE COURT: Okay.

MS. ANGOLKAR: First of all, saying deliberate indifference doesn't really get to the heart of what a Court needs to look at to actually evaluate a deliberate indifference claim. There's really two steps to that, and this Court has looked into that I think already in terms of looking at the *Whitney* case, but also looking at this in the context of qualified immunity as well. And as Plaintiffs

acknowledge, it has to be looked at for each individual defendant that's proposed, so what the separate rules are here.

They have to show that there's actual knowledge. And what's key here, it's not enough to just put a conclusory allegation in a complaint to say Lucar -- that they knew based on a guilty verdict and -- or prior suicidality, because there's no allegation that any of these individuals had contact with Brenner in the July 2016 detention or when he was at the jail. And listing off the factors or what was going on in his life when he then came into the jail in October 2017, writing it in the complaint as they knew he was suicidal based on these things, it really is, looking at that sentencing, saying he should have known. They should have known this. They should have known based on his conviction and what happened in July 2016. That should have known language or message that's taken from reading that as a whole is not enough to support a deliberate indifference standard.

And besides pleading actual knowledge, again, not enough to just say conclusorily they knew, there also has to be a second step there to show objectively -- so that's the subjective component, was there actual knowledge -- objectively, did they fail to take reasonable measures to abate that risk, again, going through each person of what

was done. The allegations in the proposed complaint say that Lucar, based on what she did, she did the initial classification, and had -- there's nothing alleging that she did anything wrong with her initial classification and where she placed him that would go beyond objective reasonable -- objectively reasonable measures to abate any risk. Again, if this Court determined that, okay, they pled enough to say she had actual knowledge, the next step is did she do enough objectively assuming that were true. For all her role was was the initial classification.

Next is Russell, again, just with classification. And, again, just simply saying that he knew isn't enough. Reading the allegations and proposed allegations as a whole, Plaintiffs are really saying that these individuals should have known. And what's important in the context of -- and I would add that argument as well for Graves and for Rourke, that once Brenner was then in his cell in the two different locations, anybody that was performing a welfare check or checking on him, there's nothing alleged in terms of actual knowledge, facts to show actual knowledge. When reading the proposed allegations, they keep going back to really a message of that they should have known. Saying that Rourke observed him in a depressed state is really saying should have known based on that.

And that's key because the -- trying to

distinguish this case from *Whitney*, simply adding an allegation to say that the jailer knew the person was -- had a suicide risk based on these factors doesn't really establish that subjective requirement, because for one thing, there's nothing establishing that -- that subjective knowledge from that person. It would be different if in one of the post-incident interviews, if somebody had made an admission that -- you know, that they -- they knew he was making comments, but in that context, we would expect to see some different things done as well and those facts just don't exist here in the complaint. So what that means is the continually alleging facts that really go to more of a should have known standard, it's not enough for a deliberate indifference standard.

THE COURT: And let me just interrupt you there in terms of your allegation that -- or the straw man you sort of put up, which is it's different if they admit knowledge. Is it your contention that that is what is required to meet the standard to dismiss -- or motion to dismiss language and standard? In other words, is -- admission of knowledge, that would clearly be sufficient. Is there anything short of admission of knowledge that would meet the standard from your perspective?

MS. ANGOLKAR: Well, in deliberate indifference cases I guess in general, there's also just in terms of the

actual knowledge of the medical condition of an individual, actual knowledge of a diagnosis or what they are specifically treating for. But in the context of a suicide case, it's -- it can't be looked at with hindsight. Suicide cases are difficult cases. It's difficult to predict suicide in general, just even with the general population, and demonstrating that simply somebody committed suicide isn't enough in a deliberate indifference case. They must show that -- that there's subjective knowledge of the risk, so it -- so to answer your question, they don't have to know, yes, this person says I'm going to commit suicide. There can be other circumstances that they have knowledge of that can support that they have knowledge of a risk, so --

THE COURT: So knowledge of symptoms is I think what they are alleging or part of what they are alleging.

MS. ANGOLKAR: Well, if every -- if the fact that somebody is -- they conveniently leave out the felony conviction for -- of what he was convicted of; but if every individual that came into a jail with a felony conviction, if that's the symptom for predicting suicide, that's not enough.

THE COURT: Sure.

MS. ANGOLKAR: An attenuated record from somebody being a suicide risk a year and a half before, it's too attenuated to have this gap, and we've cited several cases

in our brief --

THE COURT: Uh-huh.

MS. ANGOLKAR: -- addressing that. It's outside of the scope of this, but, quite frankly, in terms of just doing training on suicide risks, you know, Mr. Brenner falls outside of a category of individuals that are at a higher suicide risk when they first come into a jail.

So anyway, they also -- the Court also has to look at what are the measures taken. And in light of the practical limitations on jailers, simply laying blame or fault and pointing out what might have been done is not sufficient. And the question is not whether the jailers did all they could have done, it's whether they did what the Constitution requires. And that's under *Luckert*. So it's important not to look at it with 20/20 hindsight.

It's also -- I think the key issue here is that it's too attenuated to rely on what happened in July of 2016 from when he was in the jail. There's also no allegation that the individual defendants had personal knowledge about that history. Alleging that they have access to those records doesn't really establish whether they read those records and knew about them and then made the classifications that they did or did welfare checks that they did just based on -- on that. And even adding that with a felony conviction, again, you know, the jail is full

of people with felony convictions, yet not all of them have attempted suicide, so that's not enough either. And a prescription for medical cannabis for PTSD, even putting all of those together doesn't really red flag it to make it that obvious to establish that there's actual knowledge. This really is a classic case of hindsight is 20/20.

In terms of negligence, to some extent our argument really kind of merges in terms of the sufficiency of a negligence claim from our initial motion to dismiss focussed on Graves, although he was a jailer that did a welfare check or welfare checks when he was in that unit -- when Brenner was in that unit. Lucar and Russell were classification officers. And then Rourke, as well as a jailer of simply based on the allegation, he observed him in a depressed state, ultimately the decision to classify an inmate as suicidal is a discretionary decision. And classification decisions then are entitled to official immunity, so that means even if the Court finds that Plaintiffs have alleged enough for negligence against Lucar, Russell, and Rourke, there's still -- they are still protected by official immunity based on classification.

We didn't raise that argument for Graves because he wasn't involved in classification, and we acknowledge the issue with the welfare check. With regard to Graves, we simply stand on the argument on the merits of negligence and

the lack of foreseeability that Brenner would commit suicide based on that July 2016 record. And if there's official immunity granted, then there would also be vicarious official immunity as well.

Also very briefly with regard to the *Monell* argument, if the Court finds that the individuals are entitled to qualified immunity and dismisses the deliberate indifference claim, then there's no Section 1983 claim at issue and the *Monell* claim would be dismissed. But we also join in MEnD's arguments regarding the *Monell* claim, and also the general arguments in terms of the volume of information added to the complaint. And I anticipate that will be an issue for Magistrate Cowan Wright in terms of what will happen with discovery in this case. Thank you.

THE COURT: Let me just ask you briefly, as to the motion to amend and the motion to dismiss, if I grant the motion to amend, then the motion to dismiss becomes moot. Am I right about that?

MS. ANGOLKAR: Um, yes, it does become moot. I just -- I guess if the Court does not consider the motion to dismiss, we just then incorporate our argument on negligence with regard to Graves in that motion to amend, because we didn't raise it in opposition to the motion to amend since it had already been briefed.

THE COURT: Right.

MS. ANGOLKAR: And there wasn't -- it's not a new claim. It's -- Even though there are some new factual allegations added, it's nothing new. But just for efficiency in terms so that we're not bringing another motion to dismiss --

THE COURT: Right.

MS. ANGOLKAR: -- that we would ask that the Court consider that argument within -- within that context. And I think that may be -- I appreciate that the Court coordinated the motions together so we could kind of short-circuit that.

THE COURT: Yeah, that was my thought as well, sort of if the motion to -- if I grant the motion to amend, I consider the futility arguments that you have made in terms of all claims so that it could end up being a partial grant; right?

MS. ANGOLKAR: Yes.

THE COURT: So I'm considering the futility and I don't expect then a new motion to dismiss. You are sort of stuck with the claims, if any, that I allow to go forward.

The other question that I had then is as to jurisdiction, which is if I were to grant a motion to dismiss based on futility or deny the motion to amend based on futility, either one, leaving only potentially the state law claims, say those survive and the 1983 *Monell* claims do not, does the Court have subject matter jurisdiction at that

point?

MS. ANGOLKAR: That is at the discretion of the Court whether it retains supplemental jurisdiction over Sherburne County based on -- on the other claims, and that depends on whether there's a sufficient common nucleus of operative fact, so it -- to answer that, it really depends on whether the -- it's really at the Court's discretion.

THE COURT: Uh-huh.

MS. ANGOLKAR: I think an argument can be made either way.

THE COURT: And you don't have a position at this point?

MS. ANGOLKAR: I think the count -- Yeah, we don't have a position that we've set forth to the Court on that, but it's well within the Court's discretion to dismiss the negligence claims for lack of supplemental jurisdiction and then Plaintiffs could pursue those in state court.

THE COURT: All right. Thank you.

MS. ANGOLKAR: Thank you.

THE COURT: Mr. Novak.

MR. NOVAK: Thank you, Your Honor. I will try and focus on just the issues as it would relate to the MEnD Defendants. And we've called them M-E-N-D. It's okay to call them MEnD.

THE COURT: Thank you. All right.

MR. NOVAK: It helps us shorthand things.

THE COURT: All right.

MR. NOVAK: So listening to counsel walk us through all the moving parts, all the reasons, the timing, how long things are, how it all intersects, it gives me a little bit of a headache, almost as a side point demonstrates just how unnecessary much of what they are attempting to add is to this pleading. The reason that we focussed much of our briefing on the length of the pleading is that there's whole sections of it, many, many, many paragraphs that don't add anything new to the complaint. They pled early on that due to a prior incarceration, certain Defendants would have had access to knowledge about Mr. Brenner's prior medical condition. They've now fleshed that out to the tune of -- I don't -- I have lost track at a certain point -- 100 or something like that paragraphs related to fleshing out that one allegation.

And when you look at it, and you take a step back and look at this, the pleading standards are where we start when we're looking at pleadings. Short and plain statement is one thing, but amendments also must be material to the case, they must be done for nondilatory purposes, they must be nonprejudicial, and there are problems on each of those fronts if you look at them as to what they are trying to do here.

The point was made that the MEnD Defendants simply answered in this case. I can tell you, I don't know the answer to this yet, but you may have a subsequent motion to dismiss. You will certainly have a summary judgment motion from us in this case. We did not have the investigative tome that the Plaintiffs had clearly when they drafted any iteration of their complaint. And when you look at how it's been pled, it's pled very carefully in this case.

Mr. Brenner came in on October 6th, and his visits for screenings, for booking, for mental health assessment were all with county -- all with county staff, the folks that do the booking. One nurse is included in this initial pleading because she picked up a urine sample to do a screen.

Dr. Leonard is now included because he's a supervisor to the nurses that are involved. One nurse is involved because she met with the decedent's mother a few hours before he died to obtain and inventory his medication.

This is not a case where there's a long path of treatment at the operative time. So what we have is a lot of volume, both in terms of number and in terms of the volume on the television nature of the word, in an attempt to try and create a story here that implicates the MEnD parties. And the reason -- one of the main reasons we oppose here is because of this argument, well, these are always long complaints. They always include this type of

inflammatory rhetoric in the allegations. That doesn't mean they are proper. Just because someone else did it in another suit and they have done it in other suits, doesn't mean it's a proper way to amend a pleading.

Another item we have to talk about is is any of this information new. If this was so key and so pertinent to their claims, why hasn't it been in the lawsuit since the beginning? So we're now stuck in this sort of tortured procedural posture where the County has a motion to dismiss, there's two sets of parties who they are seeking to amend against, and the complaint is so unwieldy that you can't figure out which way is up. That is why there's a short and plain requirement to the pleading standards. So that -- I know that's sort of a long windup, Judge, but when we look at what they are trying to add, the main crux of it, if it can be boiled down, is that in 2006 when Mr. Brenner, more than a year before his death, was in jail, he treated with other nurses for --

THE COURT: 2016, right?

MR. NOVAK: 2016. I'm sorry. I misspoke.

THE COURT: Go ahead. Other nurses.

MR. NOVAK: When he's there in 2016, he treats with other nurses for mental health issues, and there's I don't believe any claim that any of that treatment was improper. So you've got page after page about treatment

that there's no allegation about being improper.

Now we have claims against new nurses. There's no allegation that these nurses saw him in 2016, and, frankly, there's no allegation that they saw him in the day or so that he was going through booking at Sherburne County. What they do to try and get there against the nurses who didn't see him in the day or so that he was at Sherburne County in October of 2017 is add page after page about 2017 when the care -- or 2016 when the care was apparently proper, a 2011 board -- Minnesota medical practice board situation with Dr. Leonard, 2011, not connected to this, he didn't get investigated for this case, it's related to something entirely different, related to documentation if you look at it, and then they add all that together and say, there must be enough here to proceed on especially these new claims. Because we have no allegation of policy. We have no allegation of a specific custom. I heard this is a custom case. I still don't know what the actual custom is because they haven't pled it. It's just here's a bunch of information that we think will make the MEnD parties look bad, and we think that that's enough to claim that there's a custom here. And if you look at the law on when a pleading is allowed to be amended, you need to do more than that, and the futility argument comes in particularly on the *Monell* claim and on the supervisory liability claim. Those claims

require more than conclusory allegations, which is what we have here.

On the -- on the *Monell* claim -- let me grab my notes on that. So *Monell* liability only comes into play when there's a municipal policy or a custom that violates federal law, and we've heard there's no policy alleged and we don't see that in the complaint, and it must be a custom. But, again, we don't get to what that actual custom is. It's some other inmates under completely different circumstances have committed suicide, and Dr. Leonard, not eight years ago, had a board finding and therefore there must be a custom inside of MEnD. That's the definition of a conclusory allegation. There's not enough pled for the *Monell* claim to stand against the MEnD Defendants.

The same general analysis comes into play on the supervisory liability claim. The *Howard* case, the 1989 Eighth Circuit case, talks about supervisory liability attaches where the supervisor received notice of a pattern of unconstitutional acts. In this case there's no allegation about what that pattern of unconstitutional acts is as it applies to Mr. Brenner, and that there's a single incident -- sorry, quote, a single incident or a series of isolated incidents usually prohibits an insufficient -- provides -- excuse me -- an insufficient basis on which to assign supervisory liability. You can't cherry-pick

individual incidents. You can't say there's another lawsuit that's ongoing where there's been absolutely no finding of liability and cherry-pick these individual things and try and create out of whole cloth a supervisory liability claim.

So that's the analysis as to futility as to *Monell* and as to the supervisory liability. The rest of it, I suppose I could go on and on, but I think it would sort of defeat the purpose when the main argument is that the second amended complaint sort of goes on and on, but it doesn't really get anywhere. 2016 care that we don't have any issue with by individual nurses that aren't parties to this case and no actual connection between any of that isn't a reason to allow an amended pleading.

THE COURT: Thank you.

MR. NOVAK: Unless you have questions, Judge, that's all I have. Thank you.

THE COURT: I don't. Thank you.

Mr. Storms.

MR. STORMS: Yes, Your Honor. I think the link between 2016 and 2017 is very clearly laid out in the second amended complaint and the supplemental memorandum. Mr. Brenner, when he was suicidal in 2016 at the Sherburne County Jail and being treated by the MEnD Defendants, was placed in administrative maximum security as a result of that suicidality, and he was maintained in booking BH-5,

which is the special cell that they put them in to watch you when you are suicidal, and he was in a Kevlar suit.

When he came back, he was -- he was never released from that cell. We cite the -- the administrative review of that in our -- in our second amended complaint, and MEnD recommended that Mr. Brenner move to general population and that he just receive 30-minute watches. The Sherburne County administrator overruled that and said, We're not letting this guy out of maximum administrative security.

So then when he came back in 2017, and we have this allegation in our complaint, Lucar, when she screens him, says he has to go back in max seg because that's how he left and he has to stay there until he's reviewed on Monday morning. So you have that direct link, he was placed in max seg because he was suicidal, and he had to stay in max seg because that's what he left as, because he was suicidal. And no one ever assessed whether or not -- in 2017 whether or not Mr. Brenner could have been moved to a different unit, and it was never approved. And so we have those allegations throughout the complaint.

So -- and we do allege knowledge. What's happening is that no one thinks any of our pleadings should be believed and no one wants to give us an opportunity to prove any of them. Everyone is saying, well, you have to look at the weight of the evidence and what it's really

saying is this, but they are wholly ignoring the Rule 12 standard, and we believe we have pleaded allegations that were specific as to knowledge and as to *Monell*. We didn't just say there was one case, one somewhere else. There are multiple suicides involving MEnD, and we have pleaded those in the case and we have an opportunity to prove that those caused, in part, Mr. Brenner's suicide.

One thing I just briefly wanted to mention too, Your Honor, was you were asking questions about knowledge, and the suggestion is just, you know, unless they admit or say we knew, then you can never have a deliberate indifference case, and that's not how these cases are won. You have to typically use circumstantial evidence to prove knowledge, because no one ever admits to knowing anything.

Two very brief points. On negligence, one of the cases that they relied upon -- Sherburne County relied upon in their opposition is this *Hott v. Hennepin County* case. And this goes to Graves and negligence and foreseeability. You know, we argued obviously that foreseeability is a question down the line and that we pleaded enough facts on foreseeability, but the *Hott v. Hennepin County* case at page 908 and 909 makes it clear that just not doing your welfare check is a violation of enough of a general duty because suicidality is known. You know, a more general duty to protect the entire inmate population from the risk of

assault, suicide, or other injury appears to exist. And they analyze the Supreme Court *Sandborg* case and actually reverse the trial court's dismissal of that case, so I think *Hott v. Hennepin County* is worth looking to.

Finally, because I know we said much here and in the papers, we do believe that -- that the Court should exercise supplemental state law jurisdiction. These clearly all relate to the same set of facts. There are federal claims that exist and we'll continue to pursue no matter what happens.

The one thing I would like to orally request because it is important to our clients that I did not put in the second amended complaint, which is if the Court allows the *Monell* claim to proceed on policy, we would, in our request for relief, ask that when we file the second amended complaint, be able to ask for injunctive and other equitable relief. We did make the request for damages but forgot to include the line I traditionally include at the end of these cases.

THE COURT: And so talk about the *Monell* claim for a minute, and you said on policy, but you are really arguing custom I think.

MR. STORMS: Custom, I'm sorry. Yes, Your Honor.

THE COURT: And I think the Defendants are having trouble identifying, and I am too, what that custom is.

Multiple instances of deliberate indifference is I think how you might have phrased it earlier.

MR. STORMS: Yeah.

THE COURT: Is that enough for a custom and can you talk about that?

MR. STORMS: Yes. And so -- and, again, the case law really says that at this stage, you don't have to have a defined custom. Usually discovery helps define your custom. But we alleged in our complaint, and I fleshed the customs out on page 40, but Plaintiffs have plausibly alleged that MEnD had customs of deliberate indifference towards the supervision of lower-level MEnD employees and towards the well-being of inmates at high risk for self-harm. And we believe that's supported by the other cases of suicidality and the clear deviation from typical medical care standards that we have in this case occurring at multiple instances with respect to documentation. We believe that supports it as well.

So -- and then with respect to Sherburne County, we allege Sherburne County knows that MEnD has this -- has this history, and yet Sherburne County continued to employ MEnD. And what hasn't been said at all is that it's not -- it's not isolated here and there. The *Lynas* case happened within a month of Mr. Brenner's suicide, and it was at Sherburne County and it was MEnD. So within 30 days, two

inmates at Sherburne County who were supposed to be receiving proper medical care by MEnD committed suicide in the same facility.

And when you look at that cumulatively in addition to some of the prior allegations that we've alleged, we think that's sufficient to show that there is a custom of indifference and a custom of a lack of supervision over the staff, which really flows naturally from this telemedicine concept where they are looking to provide this low-cost medical care, but no one is actually seeing the inmates. And Mr. Novak said it, no one ever saw Mr. Brenner. Here's a guy who has a history of suicidality at the facility, he's in a booking cell, history of traumatic brain injury, post-traumatic stress disorder, it's all in the records, he's in the cell where you engage in close suicide monitoring in the max seg unit, and no one thinks to see this man at all? And then when his mom shows up with a cocktail of drugs, still nobody sees this individual? That's part of a bigger pattern and practice and custom, and we believe we've plausibly alleged that at this point, Your Honor.

THE COURT: Let me just ask you then procedurally, I want to make sure I'm -- in hearing these together -- and you heard me question counsel for Sherburne about this -- but in hearing these together, I'm trying to be more

efficient. Technically if I were to grant your motion to amend and rule on futility, I would -- I mean, it would moot the motion to dismiss. A new motion to dismiss could be brought. We could be back here on futility. My intention would be to take all of this briefing together and rule on futility, and I want to make sure that you have put forward all the arguments in terms of the second amended complaint and futility that you intend to put forth.

MR. STORMS: I -- at this point in time, Your Honor, with respect to futility, I believe we did. I don't think -- You know, I feel like we addressed every point. We felt like there were numerous points that weren't necessarily responded to.

THE COURT: Yeah.

MR. STORMS: And I feel like we addressed those, but I don't think there's anything additional that we would add on this motion.

THE COURT: All right. Given that, then it's my intention to rule on the motion to amend and futility sort of together so that when my ruling comes out, you are left with a complaint or not that you are -- that you go forward with, and motions to dismiss would be brought only on new claims or information. And I think that's a little bit different for the MEnD Defendants because they haven't brought a motion to dismiss here but have raised futility as

to two claims.

So that would be my intention. I think that's the most efficient way to go forward and how most Courts do it, although there have been some instances where a Court would rule on a motion to amend and allow full briefing on a motion to dismiss in the instance where a Court didn't feel that they had full briefing on the futility issues; but I feel like I do and it sounds like you are all in agreement on that. Am I right? I'm hearing no objections?

All right. Fair enough. Then I think I have heard your oral arguments as to all. Is there anything further? We started with the motion to amend and dealt with futility. But on the motion to dismiss, Ms. Angolkar, anything further from the Sherburne Defendants?

MS. ANGOLKAR: No, Your Honor. We can rest on the briefing on that.

THE COURT: All right. Thank you.

Mr. Storms, anything further on that motion to dismiss from you?

MR. STORMS: No, Your Honor, just to the extent that I did reference the *Hott v. Hennepin County* case --

THE COURT: Yes.

MR. STORMS: -- that was not something that I referenced in our briefing, but I believe it was something that was raised by the Sherburne County Defendants in

opposition to our -- our motion, and I think that case is worth considering with respect to foreseeability and the existence of a duty.

THE COURT: Fair enough. All right. Thank you. Thank you, everyone. I'll take these motions under advisement and issue a ruling. Thanks.

THE LAW CLERK: All rise.

(Court adjourned at 10:52 a.m.)

* * *

I, Erin D. Drost, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Erin D. Drost*

Erin D. Drost, RMR-CRR